91-897

No. _____

In The

Supreme Court of the United States

October Term, 1991

CHRISTOPHER L. RHODES,

Petitioner,

vs.

CONTINENTAL CONVEYOR & EQUIPMENT COMPANY,

vs.

LUMMUS INDUSTRIES, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CARTER MOREY
HARALSON, KINERK,
AND MOREY, P.C.
82 South Stone Avenue
Tucson, AZ 85701
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Counsel for Petitioner,
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. Did this Court overrule *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (U.S. 1962) in *Torres v. Oakland Scavenger Company*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285, *reh. den.* 110 S.Ct. 12 (1988), and hold in the latter case that the failure to cite the judgment or order appealed from in a notice of appeal is a jurisdictional bar?

2. Did the Ninth Circuit's decision to grant Appellee's Motion to Strike Petitioner's Opening Brief create a split in the Circuits as to the issue of whether the failure to designate the judgment or order appealed from is a jurisdictional bar?

3. Did the United States Court of Appeals for the Ninth Circuit err in granting Appellee's Motion to Strike Petitioner's Opening Brief?

LIST OF PARTIES

The parties to proceedings below were, and the parties to this Petition for Certiorari are:

PETITIONER:

Christopher RHODES, **Appellant below**.

RESPONDENTS:

LUMMUS INDUSTRIES, INC., **Appellee below**.

PARTY BELOW WHO IS NOT A PARTY TO THIS PROCEEDING:

Contintental Conveyor & Equipment Co., **Defendant in the trial court, settled with Petitioner**.

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OPINIONS BELOW

The Order appealed from is reproduced in its entirety in the Appendix at 34.

JURISDICTION

Petitioner believes that jurisdiction is conferred on this Court by Title 28 U.S.C. § 1254(1) which states that cases in the Court of Appeals may be reviewed by the Supreme Court

> By writ of certiorari granted upon petition of any party to any civil or criminal case, before or after rendition of a judgment or decree;

and by Title 28 U.S.C. § 2101(e) which provides:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

CONSTITUTIONS AND STATUTES INVOLVED

Petitioner believes that no part of the United States Constitution, nor that of any state, is implicated in this Petition.

Federal Rule of Civil Appellate Procedure 3(c) provides:

> **Content of the Notice of Appeal**. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in

the Appendix of Forms is a suggested form of notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

This cases involves the issue of whether the judgment-designation language of Rule 3(c) is a jurisdictional bar. The Ninth Circuit has held that it is, relying on *Torres* despite the language to the contrary in *Foman*.

This litigation has its genesis in December 17, 1985, when Petitioner Chris Rhodes was severely injured when his right hand and forearm became entrained in the roller blade assembly of a cotton roller gin at the Strebor Gin in Bowie, Arizona. As a result of the hand injury, Rhodes underwent medical surgeries and suffered functional and scarring injuries. Chris Rhodes brought suit against a number of Defendants, including Appellee, Lummus Industries, Inc. After the issues were joined and tried to a jury, the jury returned a verdict in favor of Chris Rhodes and against Lummus in the amount of $1,000,000.00. (App. 4.) That verdict and subsequent Judgment was overturned by the District Court's granting to Appellee Lummus, Judgment n.o.v. and, conditionally, a new trial. (App. 3.)

Following the entry of judgment n.o.v. Petitioner filed several motions. (App. 8-16.) In an order dated June 20, 1990, and entered June 28, 1991, the District Court denied these motions. (App. 17.) Petitioner then timely filed his notice of appeal. (App. 20.) Shortly thereafter

Petitioner filed his Civil Docketing Statement with the United States Court of Appeals for the Ninth Circuit. (App. 22.) Once the transcript of the trial was available, Petitioner prepared and filed his Opening Brief. This brief covered all six issues contained in Petitioner's Civil Docketing Statement. (App. 30.) The issues briefed in Petitioner's brief were:

1) Whether Arizona would recognize an independent duty to warn in a products liability case;

2) Whether the District Court erred in granting summary judgment to Appellee on the issues of successor liability;

3) Whether there were sufficient facts adduced at trial to support a finding of proximate cause;

4) Whether the District Court erred in finding on its own motion that the nature of the danger was open and obvious;

5) Whether the verdict was excessive or the product of passion or prejudice; and

6) Whether Arizona's product liability Statute of Repose, A.R.S. § 12-551 was unconstitutional.

On May 29, 1991, Appellee below, Lummus Industries, filed a Motion to Strike Petitioner's Opening Brief on the grounds that the brief exceeded the scope of Petitioner's Notice of Appeal. On August 1, 1991, the Ninth Circuit granted Appellee's motion and limited Petitioner to the three issues defined in footnotes 1, 2, and 3 of the District Court's June 28, 1990 Order. In this Order the Ninth Circuit cited F.R.A.P. Rule 3(c), 28 U.S.C. as authority. (App. 33.) Petitioner and Appellee both filed

motions to reconsider. The Ninth Circuit denied each motion in Orders dated August 29, 1991. (App. 34, 36.)

As a result of the Ninth Circuit's decision to limit Petitioner to the three issues defined in the District Court's June 28, 1990 order, Petitioner filed a revised brief on only these three issues:

1) Whether Arizona would recognize an independent duty to warn in a products liability case;

2) Whether the District Court erred in granting summary judgment to Appellee on the issues of successor liability; and

3) Whether Arizona's product liability Statute of Repose, A.R.S. § 12-551 was unconstitutional. (App. 9.)

Petitioner now appeals the Ninth Circuit's August 29, 1991 Order denying its Motion to Reconsider its August 1, 1991 Order.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's ruling in its August 1, 1991 Order that the judgment-designating language of Rule 3(c) is a jurisdictional bar is inconsistent with this Court's holding in *Foman*.

In its Motion to Strike Petitioner's Brief, Appellee argued that under F.R.A.P. Rule 3(c), 28 U.S.C., because Petitioner filed a Notice of Appeal from the District Court Order signed June 20, 1990 (filed June 28, 1990), he was limited to appealing only those issues covered by that

Order. The Ninth Circuit, in its August 1, 1991 Order granted Appellee's motion and cited Rule 3(c) as authority. However, The Ninth Circuit's ruling, based on a narrow reading of Rule 3(c), was contrary to the decision in *Foman* in which this Court rejected the argument that the Notice of Appeal necessarily limits the scope of the appeal.

In *Foman* this Court reviewed the decision of the Court of Appeals for the First Circuit to hold a Notice of Appeal invalid because it did not specify from what judgment the appeal was taken. This Court noted that the First Circuit should have treated the technically incorrect Notice of Appeal as ". . . an effective although inept, attempt to appeal from the judgment sought to be vacated." This was so because, ". . . petitioner's intention to seek review . . . was manifest." 371 U.S. at 181.

This Court in *Foman* recognized the inappropriateness of the holding of the Ninth Circuit's August 1, 1991 Order:

> It is . . . entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' (Citation omitted) 371 U.S. at 181, 182.

In the case at bar, as in *Foman*, the intent to appeal the final judgment was manifest. Following entry of judgment n.o.v. by the District Court on May 21, 1990, Petitioner filed several motions. When read together the motions make it clear that Petitioner intended all along to appeal the final Judgment in the case.

Petitioner's *Renewed Application for Clarification of the Court's Ruling on the Constitutionality of A.R.S. § 12-551* states explicitly that Petitioner is attempting to ensure that this issue is preserved for appeal. (App. 8.) In the *Petition for Certification Order*, Petitioner indicated that he wanted the issues certified to the Arizona Supreme Court "to aid the Ninth Circuit Court of Appeals in the case. . . ." (App. 15.) Further, Petitioner's *Motion to Extend Time for Filing Notice of Appeal* asked the trial court for additional time to appeal from the May 21, 1990, Judgment n.o.v. The reason that Petitioner requested this extension was because there were three post-judgment motions before the trial court and Petitioner wanted to ensure that the trial court retained jurisdiction to act on these motions " . . . before Plaintiff is required to file a Notice of Appeal from the j.n.o.v." (App. 13.) Finally, in his *Civil Appeals Docketing Statement*, filed August 8, 1990, Petitioner listed the six issues to be raised on appeal that ultimately were raised. (App. 22.)

The inescapable conclusion from this sequence of pleadings is that Petitioner intended all along to appeal the May 21, 1990, Judgment, n.o.v.

Because the intent of Petitioner to appeal the May 21, 1990, Judgment n.o.v. was clear in the pleadings that

followed the entry of that Judgment, the Ninth Circuit erred in not applying *Foman* and in denying Appellee's Motion to Strike. This Court should correct this error.

II.

The Ninth Circuit's ruling in its August 1, 1991 Order that the judgment-designating section of Rule 3(c) is a jurisdictional bar is inconsistent with all other Circuits which have considered the matter.

In addition to the Ninth Circuit, seven circuits have addressed the question and not one has held that the failure to specify the judgment appealed from is jurisdictional; five have held contrary to Ninth Circuit and two have expressed no opinion.

The Fifth Circuit most recently took up the issue. In *Turnbull v. U.S.*, 929 F.2d 173 (1991), Turnbull appealed from an Order denying his Motion for New Trial rather than the final judgment. Relying on *Foman*, the Court noted, "This court has liberally construed Rule 3(c), holding that 'where the intent to appeal is . . . apparent and there is no prejudice to the adverse party,' the appeal is not jurisdictionally defective." 929 F.2d at 176, 177. Turning to *Torres* the Court pointed out:

> The *Torres* Court did not, however, view its decision as inconsistent with its decision in *Foman*. . . . The Court distinguished *Foman* on the grounds that it dealt with the judgment-designation provision rather than the party-specification provision or Rule 3(c). (Citation omitted) *Id.* at 177.

In a earlier case, *Osterberger v. Relocation Realty Services Corp.*, 921 F.2d 72 (1991), the Fifth Circuit explained why *Torres* and *Foman* are not contradictory. According to that Court, it is the interaction of F.R.A.P. Rule 4 (requirement of filing Notice of Appeal within thirty days) and the party-designation provision of 3(c) that makes the party-designation requirement of the latter rule jurisdictional.

> If a party does not comply with Rule 4, a Court of Appeals does not have jurisdiction. . . . But a party cannot circumvent the time requirements of Rule 4 by designating the wrong judgment if it is clear they intended to designate the right one. Thus, . . . *Torres has no effect* on the long line of cases that have held that an appeal erroneously taken from a denial of a motion . . . rather than from the underlying judgment, should be treated as an appeal from the judgment. (Citations omitted; emphasis added.) 921 F.2d at 74.

The Second Circuit is in harmony with the Fifth Circuit's interpretation of Rule 3(c). In *State Trading v. Assuranceforeningen Skuld*, 921 F.2d 409 (1990), the Court noted that:

> While *Torres* held that the failure to comply with this [party-designation] requirement is a jurisdictional defect, it specifically noted that this holding did not alter the *Foman* principle in favor of finding compliance by liberally construing the rules. (Citation omitted) 921 F.2d at 413, 894 F.2d at 924.

The other circuits which have considered whether the judgment-designation portion of Rule 3(c) is jurisdictional: The *First Circuit* in *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1221 (1990) ("[The Court in *Torres*] took pains not to overrule *Foman v. Davis*. . . . The *Foman* Court was addressing the 'separate provision of Rule 3(c)' requiring that the judgments or orders appealed from be designated."); The *Third Circuit* in *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 858 (1990) (Liberally construing the judgment designation requirement of Rule 3(c) " . . . is consistent with the Supreme Court's pronouncement in *Torres*. . . . "); The *Fourth Circuit* in *Smith v. Galley*, 919 F.2d 893 (1990) (Informal brief does not satisfy the party-designation requirement of Rule 3(c); no comment on jurisdictional nature of judgment-designation requirement); The *Sixth Circuit* in *Minority Employees v. Tenn. Dept. of Emp. Sec.*, 901 F.2d 1327 (1990) (The use of *et al.* in caption does not meet the party-designation requirements of Rule 3(c); did not reach jurisdictional nature of judgment-designation requirement); and The *Seventh Circuit* in *Chaka v. Lane*, 894 F.2d 923, 924 (1990) ("*Torres* did not overrule *Foman*."). The clear weight of the holdings is contrary to the Ninth Circuit's assertion that the judgment-designation requirement of Rule 3(c) is jurisdictional.

The Ninth Circuit's August 1, 1991 Order has created a split in the circuits as to whether *Torres* overrules *Foman* on the issue of whether the judgment-designation Rule 3(c) is jurisdictional. This Court should accept this Petition to resolve this split.

III.

It would be inequitable to deny Petitioner the right to appeal all six issues contained in his original Opening Brief.

In his *Civil Appeals Docketing Statement*, filed August 8, 1990, Petitioner listed the six issues to be raised on appeal that ultimately were raised. (App. 8.) Appellee thus had notice as of that date that Petitioner intended to pursue these six issues on appeal. In spite of this, Appellee made no effort to protest the technical deficiency of Petitioner's Notice of Appeal for ten months. In filing a Motion to Strike only after Petitioner had filed his Opening Brief on the six issues is not fair. It is contrary to the spirit of the Federal Rules of Appellate Procedure and the Ninth Circuit was in error to hold that Petitioner could brief but three issues.

CONCLUSION

Petitioner respectfully request that this Court issue a writ of certiorari to review the decision of the Court below.

Respectfully submitted,

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AND MOREY, P.C.
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(602) 792-4330
Counsel for Petitioner
Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES Plaintiff/Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant/Appellee.	U.S. Court of Appeals Docket No. 90-16033 Lower Court Docket No. CV-86-616-TUC-RMB Arizona (Tucson)

APPELLANT'S OPENING BRIEF

Carter Morey
Haralson, Kinerk & Morey, P.C.
82 South Stone Avenue
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(602) 792-4330
Attorney for Plaintiff/Appellant

* * *

STATEMENT OF THE CASE

The Complaint in this matter was filed on October 30, 1986, followed by an Amended Complaint on July 27, 1987. (R. 1, 12.) Answers were timely filed, and the issues were joined. (R. 15, 16.). On May 26, 1988, Appellee Lummus filed its Motion for Summary Judgment on the issue of successor liability. (R. 45, 46.) Thereafter, on June 13, 1988, Lummus moved for summary judgment on strict liability. (R. 45, 46.)

Co-Defendant Continental Conveyor and Equipment responded to the motion on successor liability on June 13, 1988, claiming that of the two Defendants, Lummus was the successor. (R. 47, 48.) Appellant opposed the summary judgment motion on successor liability on June 27, 1988. (R. 54, 55.) Various replies were duly submitted.

On September 30, 1988, the trial court denied the motion on successor liability, but granted the motion on strict liability. (R. 101.) Appellant filed a Motion for Reconsideration of this Order on February 17, 1989 (R. 114), and after a Reply and argument, the trial court amended its Order, essentially reversing the previous Order by granting the successor motion and denying the strict liability motion. (R. 117.)

A Motion to Clarify was filed by Lummus on March 20, 1989 (R. 119), responded to on March 29, 1989 (R. 121), and the trial court entered its Order clarifying the issues for trial on April 4, 1989 (R. 124). This matter went to jury trial on June 1, 1989. (R. 164.) On June 16, 1989, the jury returned a verdict in the sum of $1,000,000.00 for Appellant. (R. 164.)

The Judgment was entered on June 30, 1989, after reduction of the verdict by the settlement amount paid by Continental Conveyor and Equipment Co. (R. 202.) Appellee Lummus submitted a Motion for Judgment N.O.V., together with a Motion for New Trial on July 18, 1989. (R. 212, 213.) They were duly opposed by Appellant on July 20, 1989. (R. 215, 216.) The replies were timely filed. (R. 222, 223.) On December 4, 1989, the hearing was held. (R. 246.)

On May 2, 1990, the trial court granted the Motion for Judgment N.O.V., and conditionally granted a part of the new trial motion on damages. (R. 248.) The final Judgment was entered on May 21, 1990. (R. 252.) In the interim, Appellant moved for relief from the granting of the Judgment N.O.V. on May 17, 1990. (R. 251.) Lummus responded. (R. 252.) This relief was denied on June 28, 1990. (R. 265.) In the same Order, Appellant's time for appeal was extended, and the timely appeal was filed July 17, 1990. (R. 268.) On May 29, 1991 Appellee Lummus Industries filed a Motion to Strike Opening Brief, or Alternatively, Motion for Summary Affirmance. Appellant opposed the Motion. On August 1, 1991, this Court granted Appellee's Motion and ordered that Appellant submit his Opening Brief, limited to the three issues defined in footnotes 1, 2, and 3 of the District Court's June 28, 1991, Order. On August 9, 1991, Appellant filed a Motion to Reconsider. On August 9, 1991, Appellee filed a Motion for Clarification/Motion to Reconsider this Court's August 1, 1991 Order. Appellee filed a response to Appellant's Motion to Reconsider on August 26, 1991. On August 29, 1991, Appellant was informed by telephone by Donna Gilmore that his August 9, 1991 Motion had been denied and that his Opening Brief was due in San Francisco that same day.

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State Bar No. 003734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES, a single man, Plaintiff,	)	NO. CIV 86-616 TUC RMB [JMF]
vs.	)	
CONTINENTAL CONVEYOR & EQUIPMENT COMPANY, INC., a Delaware corporation, et al.,	)	JUDGMENT
Defendants.	)	(Filed Jun. 30, 1989)

This case having been tried in open court, and the jury having received evidence, and returning their verdict on June 15, 1989, and finding as follows:

1. Full damages in the amount of $1,000,000.00.

2. Plaintiff, Christopher Rhodes' fault – zero.

3. Defendant, Lummus Industries' fault – ten percent (10%).

4. Continental Conveyor and Equipment, Hardwicke-Etter, Strebor, Roberts Farms' fault – ninety percent (90%).

The Court having been advised of a settlement between Plaintiff land Continental Conveyor and Equipment Company in the amount of Two Hundred and Fifty Thousand Dollars ($250,000.00), and the Court having acknowledged the fact of the settlement during trial, the Court orders judgment in favor of the Plaintiff, Christopher Rhodes, and against Defendant, Lummus Industries, Inc., in the amount of One Million Dollars ($1,000,000.00), and further orders that at the time the settlement between Continental Conveyor and Equipment Company and Plaintiff is concluded, the Judgment of One Million Dollars ($1,000,000.00) is reduced to Seven Hundred and Fifty Thousand Dollars ($750,000.00). Plaintiff is further awarded his costs. This Judgment will accrue interest at the statutory rate of interest from this date forward.

Dated this 30 day of June, 1985.

/s/ James Fitzgerald
Honorable James Fitzgerald
Judge of the
District Court

Copy of the foregoing mailed
this ___ day of ___, 1989,
to:

Brian Burt
Teilborg, Sanders & Parks
Teilborg, Sanders & Parks
3030 N. Third Street, Suite 1300
Phoenix, Arizona 85012
Attorney for Defendant LUMMUS

UNITED STATES DISTRICT COURT

_____ DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES,
Plaintiff,

V.

LUMMUS INDUSTRIES, INC.,
Defendant.

AMENDED JUDGMENT IN A CIVIL CASE

CASE NUMBER: CIV 86-616-TUC-RMB (JMF)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XXX] **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to Order of Judgment Notwithstanding the Verdict filed May 2, 1990, the JUDGMENT entered in this matter on June 30, 1989, is AMENDED as follows:

IT IS ORDERED and ADJUDGED that JUDGMENT is entered in favor of the Defendant LUMMUS INDUSTRIES, Inc., and against the Plaintiff.

May 21, 1990
Date

RICHARD H. WEARE
Clerk

/s/ Virginia Abeyta
(By) Deputy Clerk

MAY 23 1990

HARALSON, KINERK & MOREY, P.C.
ATTORNEYS AT LAW
82 SOUTH STONE AVENUE
TUCSON ARIZONA 85701
(602) 792-4330

Carter Morey
State Bar No. 003734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES, a single man, Plaintiff,	NO. CIV 86-616 TUC RMB [JMF]
vs.	PLAINTIFF'S RENEWED APPLICATION FOR CLARIFICATION OF THE COURT'S RULING ON THE CONSTITUTIONALITY OF A.R.S. §12-551
CONTINENTAL CONVEYOR & EQUIPMENT COMPANY, INC., a Delaware corporation, et al.,	
Defendants.	

Pursuant to the Court's Order of May 2, 1990, Plaintiff renews his application for clarification on the constitutionality of A.R.S. § 12-551, Arizona Products Liability Statute of Repose. Plaintiff has reviewed the Court's Minute Entries and does not find a specific ruling on the constitutionality of A.R.S. § 12-551. The trial transcripts have been ordered, but not yet received. Plaintiff did make the constitutionality of A.R.S. § 12-551 an issue in the Objections and Exceptions to offered jury instructions per the Court's Order.

Plaintiff filed Objections and Exceptions based on the Statute of Repose preventing Plaintiff from getting products liability instructions. (See Minute Entry, June 15, 1989, and Objections and Exceptions to the Jury Instructions, June 26, 1980.)

The Court did rule that the cotton gin that Rhodes was injured on was manufactured at least twelve years earlier and that the Statute of Repose applied. Plaintiff now requests a specific ruling that the Statute of Repose is unconstitutional. Plaintiff realizes that *Bryant v. Continental Conveyer & Equipment Co., Inc.*, (1988) 156 Ariz. 193, 751 P.2d 509 (a predecessor case to Rhodes in which the same lawyers participated), holds the statute to be constitutional.

Although the transcript of argument, Minute Entries and jury instruction Objections and Exceptions may be sufficient to preserve and present this issue for appeal, Plaintiff requests the Court's ruling to be sure.

Dated this 1st day of June, 1990.

HARALSON, KINERK &
MOREY, P.C.

/s/ Carter Morey
Carter Morey
Attorney for Plaintiff

Copy of the foregoing mailed
this 1 day of June, 1990,
to:

EXHIBIT 1

CIVIL MINUTES

Civil Case No. CIV-86-616-T-RMB (JMF)
Date: June 14, 1989
Title: Christopher Rhodes vs. Continental Conveyor

PRESENT:

HON. James M. Fitzgerald JUDGE

Betty M. Solis	Carol Post
Deputy Clerk	Court Reporter
ATTORNEY(S) FOR PLAINTIFF(S)	ATTORNEY(S) FOR DEFENDANT(S)
Carter Morey	Brian Burt & Richard Kent for Lummus

X JURY TRIAL ___ COURT TRIAL (Filed June 15, 1989)

___ Jury impaneled and sworn (Jury list on reverse)

___ Jury/trial held, 7th day.

___ Witnesses sworn and examined (___ under Rule) (see separate list)

___ Exhibits marked for I.D. (___ admitted into evidence) (see separate list)

X Case cont. to: 9:00 a.m., Thurs., June 15, 1989 for further deliberation.

X Jury retires to deliberate at: 12:05 p.m. on Wed., June 14, 1989

___ JURY RETURNS VERDICT/COURT FINDS: _____

_____

_____

_____

_____

___ Order Mistrial Declared.

___ Motion for Directed Verdict GRANTED on behalf of

_____

___ MATTER TAKEN UNDER ADVISEMENT

X Other: Plaintiff's counsel orally moves for a Motion to preclude defendant Lummus Industries mention either Workman's Compensation or OSHA Regulations in their closing argument.

(CONTINUED ON REVERSE)

Copies issued to: Morey, Burt, Kent, RMB, JMF

LIST OF JURORS

1. Paava Oflund
2. Don Moore
3. Sandra Putman
4. Bernice Anderson
5. Hyla Arnold
6. Phyllis Wheeler

M. Jane Kiserschmidt
Alternate

_____
Alternate

CONTINUED FROM FRONT

It is ordered that Defendant Lummus Industries is hereby precluded from mentioning Workmen's Compensation or any other insurance in their closing argument.

It is further ordered that Defendant Lummus Industries is hereby precluded from mentioning OSHA Regulations in their closing argument.

It is further ordered that all admitted exhibits begrudged of any mention of Workmen's Compensation or any other insurance and of any mention of any OSHA Regulations prior to the admitted exhibits being submitted to the Jury.

The Court rejects the exceptions of the Jury Instructions and instructs all counsel to file with the Clerk their exceptions in typewritten form to be made a part of the record.

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State Bar No. 003734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES, a single man, Plaintiff, vs. CONTINENTAL CONVEYOR & EQUIPMENT COMPANY, INC., a Delaware corporation, et al., Defendants.	NO. CIV 86-616 TUC RMB [JMF] MOTION TO EXTEND TIME FOR FILING NOTICE OF APPEAL

Pursuant to Federal Rules of Appellant Procedure, Rule 4(a)(5), Plaintiff moves that this Court to extend the time for filing his Notice of Appeal from the Amended Judgment entered May 21, 1990, until thirty days after this Court decides motions presently before it.

Defendant's j.n.o.v. was entered on May 21, 1990. Pursuant to Rule 4(a)(4) Plaintiff's Notice of Appeal must be filed thirty days after j.n.o.v. entry, June 20, 1990.

Rule 4 contemplates good cause extension of time for filing Notices of Appeal. Plaintiff has good cause for an extension because there are three motions before the Court: 1) Motion for Certification; 2) Motion for Relief of Judgment or in the Alternative Motion for Reconsideration; 3) Motion for Clarification of Ruling on A.R.S. § 12-551 Statute of Repose. This Motion is made so that this Court retains jurisdiction to decide these Motions before Plaintiff is required to file a Notice of Appeal from the entry of j.n.o.v.

Respectfully submitted this 1st day of June, 1990.

HARALSON, KINERK & MOREY, P.C.

/s/ Carter Morey
Carter Morey
Attorneys for Plaintiff

Copy of the foregoing mailed
this 1 day of June, 1990,
to:

Brian Burt
Teilborg, Sanders & Parks
3030 N. Third Street, Suite 1300
Phoenix, Arizona 85012
Attorney for Defendant LUMMAS

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Carter Morey
State Bar No. 003734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES, a single man, Plaintiff,	)	NO. CIV 86-616 TUC RMB
vs.	)	
CONTINENTAL CONVEYOR & EQUIPMENT COMPANY, INC., a Delaware corporation, et al.,	)	PETITION FOR CERTIFICATION ORDER
Defendants.	)	

Plaintiff petitions this Court, pursuant to A.R.S. § 12-1861, *et seq.*, to certify the attached Order to the Arizona Supreme Court. The Court has removed Plaintiff's theories on successor corporation, independent duty to warn, and strict products liability. Plaintiff submits that these issues are now ripe for determination by the Arizona Supreme Court.

Following a jury verdict and judgment in Plaintiff's favor and against Lummus Industries, Inc., this Court granted Lummus j.n.o.v. because Plaintiff succeeded on

untested legal theories. Until the Arizona Supreme Court or state legislature offers further guidance, Plaintiff's action will be severely prejudiced. The recent decision in *Torres v. Goodyear Tire & Rubber Co.*, 51 Ariz. Adv. Rep. 13 (1990) (*Torres III*), is the indication from the Arizona Supreme Court of extending tort liability.

Torres was decided twice by the Ninth Circuit Court of Appeals before the Arizona Supreme Court finally decided the issue. To aid the Ninth Circuit Court of Appeals in this case and to avoid further delay and cost, the issues of successor corporation, independent duty to warn, and the constitutionality of the Statute of Repose should be decided by the Arizona Supreme Court. Plaintiff requests his Petition for Certification be granted.

Dated this 1st day of June, 1990.

HARALSON, KINERK & MOREY, P.C.

/s/ Carter Morey
Carter Morey
Attorney for Plaintiff

Copy of the foregoing mailed
this 1 day of June, 1990,
to:

Brian Burt
Teilborg, Sanders & Parks
3030 N. Third Street, Suite 1300
Phoenix, Arizona 85012
Attorney for Defendant LUMMAS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES, a single man, Plaintiff, vs. CONTINENTAL CONVEYOR & EQUIPMENT COMPANY, INC., a Delaware corporation, LUMMUS INDUSTRIES, INC., a Georgia corporation, Defendants.	Case No. CIV 86-616 TUC RMB [JMF] ORDER (Filed Jun. 28, 1990)

Plaintiff's Motion For Relief Of Judgment; Or, In The Alternative Motion For Reconsideration is DENIED. The certified question answered by the Arizona Supreme Court in *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939 (Ariz. 1990), and the Ninth Circuit's conforming decision, *Torres v. Goodyear Tire & Rubber Co.*, No. 87-2062, slip op. (9th Cir. Apr. 13 1990), were both available to and considered by me before I entered my order of May 2, 1990. Nothing in those decisions mandates legal conclusions different from those I have made regarding the duty to warn based on theories of negligence.

As to points two[1] and three[2], plaintiffs Petition For Certification Order is DENIED. As for point one[3],

---

[1] Point two being:

> Whether a corporation (Lummus Industries, Inc.) that acquires significant property interests of a prior corporation (including critical patents) and then manufactures an essentially identical product (high-capacity roller gin) and continues to maintain and service the predecessors' cotton gins has an independent duty to warn of the prior corporation's defective product?

Plaintiff's proposed certification order at 2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

[2] Point three being:

> Whether the twelve year Statute of Repose limitations portion of A.R.S. § 12-551 is unconstitutional under Article 18, Section 6 under the due process/equal protection divisions of the Arizona Constitution when the machine involved in the injury was distributed for use more than twelve years prior to the injury.

Plaintiff's proposed certification order at 2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

[3] Point one being:

> Whether a corporation (Lummus Industries, Inc.) that acquires significant property interests of a prior corporation (including critical patents) and then manufactures an essentially identical product (high-capacity roller gin) and continues to maintain and service the predecessors' cotton gins may be liable as a successor corporation under strict liability and/or negligence for a defective and unreasonably dangerous product?

Plaintiff's proposed certification order at 1-2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

plaintiff should make his application to Chief Judge Bilby since Judge Bilby made the substantive ruling on the issue of successor liability.

Plaintiff's Renewed Application For Clarification Of The Court's Ruling On The Constitutionality Of A.R.S. § 12-551 is DENIED.

Good cause showing, plaintiff's Motion To Extend Time For Filing Notice Of Appeal is GRANTED. Plaintiff shall have until July 20, 1990, to file his notice of appeal.

IT IS SO ORDERED.

DATED this 20th day of June, 1990, at Anchorage, Alaska.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

HARALSON, KINERK & MOREY, P.C.
ATTORNEYS AT LAW
82 SOUTH STONE AVENUE
TUCSON ARIZONA 85701
(602) 792-4330

Carter Morey
State Bar No. 003734

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES, a single man, Plaintiff, vs. CONTINENTAL CONVEYOR & EQUIPMENT COMPANY, INC., a Delaware corporation, et al., Defendants.	NO. CIV 86-616 TUC RMB [JMF] NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Plaintiff, CHRISTOPHER L. RHODES, appeals to the United States Court of Appeals for the Ninth Circuit, from the Order entered in this action on the 20th day of June, 1990; that Order extended Rhodes' time for filing a Notice of Appeal until July 20, 1990.

Dated this 16 day of July, 1990.

HARALSON, KINERK & MOREY, P.C.

/s/ Carter Morey
Carter Morey
Attorney for Plaintiff

Copy of the foregoing mailed
this 16 day of July, 1990,
to:

Brian Burt
Teilborg, Sanders & Parks
3030 N. Third Street, Suite 1300
Phoenix, Arizona 85012
Attorney for Defendant LUMMAS

P.O. Box 547
San Francisco, CA 94101

Court of Appeals
Docket Number:
90-16033

YOU MUST FILE AN ORIGINAL AND ONE COPY OF THIS FORM WITH THE CLERK OF THIS COURT WITHIN 14 CALENDAR DAYS OF THE DATE THE FORM IS SENT BY THE CLERK. YOU MUST ATTACH TO THE ORIGINAL AND TO THE COPY OF THIS FORM (1) A COPY OF THE JUDGMENT OR ORDER APPEALED FROM, (2) A COPY OF ANY OPINION OR FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE JUDGMENT OR ORDER, AND (3) PROOF OF SERVICE ON OPPOSING COUNSEL.

CIVIL APPEALS DOCKETING STATEMENT

Case Name: Rhodes v. Continental Conveyor & Equipment & Lummus

District Court/Agency: US District Court for District of Arizona; Tucson

District Court/Agency Docket No.: 86-616

District Judge: Fitzgerald

Party filing appeal/petition: Plaintiff Rhodes

A. Timeliness of Appeal or Petition for Review of Enforcement:

(1) Date of entry of judgment or order: 06-30-89 #202

(2) Service date of any post-judgment motion (other than motion for fees and costs): 07-20-89

(3) Date of entry of order deciding post-judgment motion: 05-22-90

(4) Date notice of appeal or petition filed: 07-17-90

(5) Last day for filing appeal or petition: 07-20-90

(6) Authority fixing time limit for filing appeal or petition:

Fed. R. App. P. 4(a)(1) ___ Fed. R. App. P. 4(a)(4) ___

Fed. R. App. P. 4(a)(2) ___ Fed. R. App. P. 4(a)(5) ___

Fed. R. App. P. 4(a)(3) ___ Other Court order – dated 06-28-90

Appeal from District Court:

(1) Is the order appealed from a final order (i.e., does it dispose of the action as to *all* claims by *all* parties)? X

(2) If the order is not a final disposition as to all claims by all parties, did the district court direct the entry of judgment in accordance with Fed. R. Civ. P. 54(b)? _____

(3) If not final, is the order appealable as the grant or denial of an injunction under 28 U.S.C. § 1252(a)(1)? _____

(4) If none of the above applies, what is the basis for appellate jurisdiction? _____

Review of Agency Decision: If the appeal is from an agency decision, what statute or other authority grants this court power to review that decision?

(X) Damages:
amount sought $1,000,000.00 amount granted $1,000,000.00

( ) Injunctive Relief: ( ) preliminary ( ) permanent
( ) granted ( ) denied

( ) Declaratory Relief: ( ) granted ( ) denied

( ) Attorney Fees: amount sought $_____ amount granted $_____

( ) Other (specify) _____

Nature of Disposition below:

( ) Bench Trial
(X) Jury Verdict
( ) Summary Judgment
( ) Grant/denial of Injunction
( ) Default Judgment
( ) Agency Order

( ) Dismissal:
( ) Lack of Jurisdiction
( ) Failure to State a Claim
( ) Failure to Prosecute
( ) Other _____
(X) Other Order granting judgment notwithstanding the verdict. Conditional new trial on damages if JNOV reversed or remanded

---

Length of Trial or Hearing:

Equivalent of eight (8) full days

Preparation of Reporter's Transcript:

(1) Do you intend to order any portion of the reporter's transcript for the appeal? Yes X No ___

(2) Have you filed the transcript designation and order form in the district court? Yes ___ No X

Have you made arrangements for payment with the court reporter? Yes X No ___

(3) Estimated date of completion of transcript (if known): _____

Brief Description of the Nature of the Action and the Result Below:

Rhodes suffered injuries to his right arm while working at a cotton gin. The gin was manufactured by Hardwick Etter (H-E). H-E was sold out to Continental Conveyor and Equipment Co. (CCE), then H-E disbanded. CCE later sold its patents and all interests to the H-E gin Lummus. Plaintiffs pursued negligence and products liability action against CEE [sic] and Lummus.

During Pre-trial proceedings, Plaintiffs' issues were narrowed considerably. The issue left for trial was whether Lummus and CCE was liable under theories of negligence or strict products liability for failing to warn of predecessors unreasonably dangerous cotton gin. Pursuant to a settlement agreement, Defendant CCE was dismissed and Rhodes pursued Lummus.

SEE ATTACHED SHEET

3. During trial, Plaintiffs were further narrowed to a negligent independent duty to warn. The jury returned a verdict for Rhodes in the amount of $1,000,000.00. The setoff of $250,000.00 between CCE-Plaintiff reduced the verdict to $750,000.00.

4. The court in post-trial motions granted JNOV. The JNOV was based on the lack of Arizona authority on independent duty to warn. The court further found the danger obvious. In addition, Rhodes damages were not proximately related to Lummus' failure to warn (i.e., even with a warning, Rhodes injuries would have occurred.) A

conditional new trial was granted on damages if the NJOV [sic] is vacated or reversed. The trial court believes $1,000,000.00 is excessive.

Standard of Appellate Review (Specify the proper standard of review to be applied by the court for each issue to be raised, citing relevant authority):

See attached.

Do you believe that settlement is feasible in this case? Yes X No ___

Why or why not?

The liability exposure has been realistically assessed by a jury.

Would a prebriefing conference be useful in this case? Yes X No ___

Why or why not?

To narrow down the issues and record for the appellate Court's convenience.

I.

Issues to be raised on appeal:

1. Whether Lummus has an independent duty to warn?
2. Whether Lummus is a successor corporation?
3. Whether Arizona's statute of repose is constitutional?
4. Whether the damages award by the jury is excessively high?
5. Whether the cotton gin is an open and obvious danger?
6. Whether Lummus' failure to warn proximately caused Rhodes' damages?

J.

Standard of review per issue and authority:

1. Independent duty to warn: In reviewing a JNOV the evidence is viewed in light most favorable to non-moving party. The JNOV must be the only reasonable conclusion. *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th CA, 1988).
2. Successor corporation: A grant of summary judgment is reviewed de novo. *Torres v. Goodyear Tire & Rubber Co., Inc.*, 857 F.2d 1293 (9th CA, 1988).
3. Statute of repose: the statute of repose is reviewed under strict scrutiny as affecting a fundamental right. *Davis v. Dow Chemical Corp.*, 819 F.2d 231 (9th CA, 1987).
4. Damages: The appellate court reviews a new trial on bases of whether the trial court abused its discretion. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d

1001 (9th CA, 1985); Cert den 474 US 1059, 88 L Ed 2d 778, 106 S Ct 802.

5. Obvious danger: Review of JNOV, see # 1 above.

6. Proximate cause: Review of JNOV, see # 1 above.

Attorney Carter Morey Telephone 602-792-4330

Firm Haralson, Kinerk & Morey

Address 82 South Stone Avenue
Tucson, Arizona 85701

Client Rhodes, Christopher L.

Attorney Richard Kent Telephone 602-230-5600

Firm Teilborg, Sanders & Parks, P.C.

Address 3030 North Third Street, Suite 1300

Phoenix, Arizona 85012-3039

Client _____

Attorney _____ Telephone _____

Firm _____

Address _____

_____

Client _____

(list additional counsel on separate sheet if necessary)

Attorney of Appellant (if pro se) Filing Docketing Statement

Name Carter Morey Telephone (602) 792-4330

Firm HARALSON, KINERK & MOREY, P.C.

Address 82 South Stone Avenue

Tucson, Arizona 85701

Check one: (X) Attorney ( ) Appellant pro se

/s/ Kenneth Lee August 8, 1990
Signature Date

Kenneth Lee, for Carter Morey

If this is a joint statement by multiple appellants, add the names and addresses of other counsel on an additional sheet accompanied by a indication that they concur in the filing of this statement.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES Plaintiff/Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant/Appellee.	U.S. Court of Appeals Docket No. 90-16033 Lower Court Docket No. CV-86-616-TUC-RMB Arizona (Tucson)

APPELLANT'S OPENING BRIEF

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Attorney for Plaintiff/Appellant

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* * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES, Plaintiff-Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant-Appellee.	No. 90-16033 DC# CV-86-0616-RMB Arizona (Tucson) ORDER (Filed Aug. 1, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellee's motion to strike appellant's opening brief is granted. *See* Fed. R. App. P. 3(c). Appellee's alternative motion for summary affirmance is denied.

Within 28 days of the date of this order, appellant shall file a new opening brief. Appellant's brief shall be limited to the issues defined in footnotes 1, 2, and 3 of the district court's June 28, 1990 order. The remainder of the briefing schedule shall be as set forth in Fed. R. App. P. 31(a). Failure to comply with this order may result in dismissal of this appeal pursuant to 9th Cir. R. 42-1.

MoCal 7/30/91
2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES, Plaintiff-Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant-Appellee.	No. 90-16033 DC# CV-86-0616-RMB Arizona (Tucson) ORDER (Filed Aug. 29, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellant's motion to reconsider is denied. No further motions to reconsider will be entertained.

MoCal 7/30/91 (Mem 8/91)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES, Plaintiff-Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant-Appellee.	No. 90-16033 DC# CV-86-0616-RMB Arizona (Tucson) ORDER (Filed Aug. 29, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellee's motion to reconsider or clarify is denied. Appellee is reminded that the panel that considers this appeal on the merits has the discretion to decide whether certain orders or issues are properly before it. The briefing schedule established in the court's August 1, 1991 order shall remain in effect.

MoCal 7/30/91 (Mem 8/91)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES, Plaintiff-Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant/Appellee.	No. 90-16033 DC# CV-86-0616-RMB Arizona (Tucson) ORDER (Filed Aug. 29, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellee's motion to reconsider or clarify is denied. No further motions to reconsider will be entertained.

MoCal 7/30/91 (Mem 8/91)

(2)

No. 91-897

In The

Supreme Court of the United States

October Term, 1991

CHRISTOPHER L. RHODES,

Petitioner,

vs.

LUMMUS INDUSTRIES, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

RICHARD A. KENT
(Counsel of Record)
BRIAN R. BURT
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Counsel for Respondent
Lummus Industries

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Did the Ninth Circuit err in striking portions of Petitioner's Opening Brief based on the failure of his Notice of Appeal to comply with Rule 3(c)'s "order designation" requirement?

LIST OF PARTIES

The parties to the proceedings below were, and the parties to this proceeding are:

PETITIONER:

Christopher RHODES, Plaintiff and Appellant below.

RESPONDENT:

LUMMUS INDUSTRIES, INC., Defendant and Appellee below.

PARTY BELOW WHO IS NOT A PARTY TO THIS PROCEEDING:

Continental Conveyor & Equipment Co., Defendant in the trial court who settled with Petitioner.

The parent companies and non-wholly owned subsidiaries of Lummus Industries are:

Anderson & Bigham, Inc.
Westex
Sun Advertising Agency, Inc.
Lummus Development Corp. (LDC)
Eli Whitney of Texas, Inc.
Microsonics, Inc.
Lummus Agricultural Services Corp.
Francais Trading Corp.
Lummus Holdings Corp.
The Lummus Group, Inc.
Response Marketing, Inc.
St. Jude Polymer Corp.
Lummus-Hubei Joint Venture

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CONSTITUTIONS AND STATUTES

OPINIONS BELOW

None of the opinions or judgments below has been published. The August 1, 1991 Ninth Circuit order granting in part and denying in part Lummus' Motion to Strike Petitioner's Opening Brief, the August 29, 1991 Ninth Circuit order denying Petitioner's Motion to Reconsider the August 1, 1991 order and the District Court's June 28, 1990 order are reproduced, respectively, as Appendices B, C and A.

JURISDICTION

As more fully set forth in the Argument section of this Brief, the Petition for Writ of Certiorari lacks jurisdiction because the Court of Appeals has not rendered judgment and Petitioner has failed to make the showing of "imperative public importance . . . as to require immediate settlement" required by Supreme Court Rule 11.

CONSTITUTIONS AND STATUTES

No part of the United States Constitution is implicated in this proceeding. The following rules of procedure and statutes are relevant here.

Federal Rule of Civil Appellate Procedure 3(c) provides:

> **Content of the Notice of Appeal.** The Notice of Appeal shall specify the party or parties taking the appeal; shall designate the judgment, order, or part thereof appealed from; and shall name

> the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of Notice of Appeal. An appeal shall not be dismissed for informality of form or title of the Notice of Appeal.

Federal Rule of Appellate Procedure 4(a)(1) provides in relevant part:

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. . . .

Federal Rule of Appellate Procedure 26(b) provides in relevant part:

> **Enlargement of Time**. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal.

United States Supreme Court Rule 11 provides:

> **CERTIORARI TO A UNITED STATES COURT OF APPEALS BEFORE JUDGMENT**
>
> A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to

require immediate settlement in this Court. 28 U.S.C. § 2101(e).

28 U.S.C. § 2101(e) provides:

> An application to the Supreme Court for a Writ of Certiorari to review a case before judgment has been rendered in the Court of Appeals may be made at any time before judgment.

28 U.S.C. § 1254 provides in pertinent part:

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

Ninth Circuit Rule 28-1 provides:

> Briefs not complying with F.R.A.P. and these rules may be stricken by the Court.

STATEMENT OF THE CASE

Petitioner Chris Rhodes ("Petitioner") seeks review of the Ninth Circuit's order striking three of the six arguments in his original Opening Brief based on the failure of his Notice of Appeal to comply with Rule 3(c), F.R.A.P.

Petitioner brought this action against various defendants, including Respondent Lummus Industries ("Lummus"), for injuries sustained to Petitioner's hand while operating a cotton gin. R. 1, 12. Petitioner alleged

Lummus was liable based on alter ego and successor liability theories, even though Lummus did not manufacture, sell or maintain the cotton gin, and even though the same district court in a related action involving the same gin, the same plaintiff's counsel and Lummus had held that Lummus was not the alter ego or successor of the manufacturer. R. 12, 46, 45, at Exhibit A, R. 37, Exhibit A, R. 38, paragraph 5, R. 47, at 2, R. 48, paragraph 3.

The district court here rejected Petitioner's various claims against Lummus in three separate rulings. First, the court granted Lummus' Motion for Partial Summary Judgment as to Petitioner's theories of successor liability, with instructions that Petitioner could proceed to trial with his remaining claim that Lummus was liable under an "independent duty to warn" negligence or strict tort liability theory which Arizona has not recognized. R. 101, 117, R. 124, 248, at 1-2. Second, during trial the district court granted in part Lummus' Motion for Directed Verdict and held that Arizona Revised Statutes (A.R.S.) § 12-551, Arizona's twelve-year product liability statute of repose, barred Petitioner's strict liability theory. R. 180, 248, at 2; June 12, 1989 transcript, at 34-40, 50-52; June 14, 1989 transcript, at 22. The case thus proceeded to the jury based only on Petitioner's negligent independent duty to warn theory. Third, after the jury returned a verdict in favor of Petitioner and found Lummus to be 10% at fault, the district court granted Lummus' Motion for Judgment NOV and, conditionally, new trial as to the verdict based on negligent independent duty to warn. R. 164, 202, 248.

Subsequent to the granting of the JNOV, Petitioner filed several miscellaneous post-trial motions. On May 17, 1990, Petitioner moved the district court to reconsider

the JNOV as to the alleged independent duty to warn theory in light of a recent Arizona case. R. 251, 253. Lummus opposed Petitioner's Motion to Reconsider because Lummus had already provided the case to the court and because the case supported Lummus' position. R. 253. Petitioner also moved to extend the time for filing his Notice of Appeal to July 20, 1990 and further requested that the district court rule it had considered the constitutionality of the product liability statute of repose during trial. R. 255, 256, 263. Petitioner now admits he did not challenge the constitutionality of the statute at trial. Petitioner's revised Opening Brief, at 15. Petitioner also filed a Motion to Certify three issues to the Arizona Supreme Court: 1) successor liability, 2) independent duty to warn, and 3) the constitutionality of the Arizona product liability statute of repose. R. 254.

By order signed June 20, 1990 and entered June 28, 1990, the district court denied Petitioner's Motion to Reconsider the granting of the JNOV as to the independent duty to warn. (App. A). The court explained it had considered the recent Arizona case prior to granting the JNOV and that the case supported Lummus', not Petitioner's, position. (App. A). The June 28 Order also extended the time to appeal to July 20, 1990 and denied Petitioner's Petition for Certification and motion requesting the court to rule it had considered during trial the constitutionality of A.R.S. § 12-551. (App. A).

On July 16, 1990, Petitioner filed his Notice of Appeal. R. 268. The Notice stated, in its entirety:

> NOTICE IS HEREBY GIVEN that Plaintiff, CHRISTOPHER L. RHODES, appeals to the United States Court of Appeals for the Ninth

> Circuit, from the Order entered in this action on the 20th day of June, 1990; that Order extended Rhodes' time for filing a Notice of Appeal until July 20, 1990.

R. 268.

While there is no order in this case "entered" on June 20, 1990, the order to which Petitioner's Notice of Appeal apparently referred was the order signed on June 20 and entered on June 28, 1990. As stated above, that Order denied Petitioner's motions to reconsider the JNOV as to independent duty to warn, to certify questions to the Arizona courts and to rule that Petitioner had raised during trial, and the court had considered, the constitutionality of A.R.S. section 12-551. R. 265. Petitioner's Notice of Appeal did not list the Partial Summary Judgment as to successor liability, the Partial Directed Verdict as to the applicability of the statute of repose, the Judgment, Amended Judgment, or the JNOV or conditional New Trial Order. R. 268. Moreover, the only basis for the May 17, 1990 Motion to Reconsider the partial JNOV as to independent duty to warn which the June 28, 1990 Order denied was that the court should reconsider the JNOV in light of the recent case which the court had considered in granting the JNOV. R. 265, 251.

On April 29, 1991, Petitioner mailed his original Opening Brief. Petitioner's Opening Brief challenged numerous rulings not listed in his Notice of Appeal. The issues addressed in Petitioner's original Opening Brief were:

> 1) Whether Arizona would recognize an independent duty to warn in a products liability case;

2) Whether the District Court erred in granting summary judgment to Appellee on the issues of successor liability;

3) Whether there were sufficient facts adduced at trial to support a finding of proximate cause;

4) Whether the District Court erred in finding on its own motion that the nature of the danger was open and obvious;

5) Whether the verdict was excessive or the product of passion or prejudice; and

6) Whether Arizona's product liability Statute of Repose, A.R.S. § 12-551, was unconstitutional.

On May 29, 1991, Lummus filed a Motion to Strike Petitioner's Opening Brief or, Alternatively, Motion for Summary Affirmance. The grounds for the Motion were that the Brief exceeded the scope of Petitioner's Notice of Appeal and that there was appellate jurisdiction only as to the matters adjudicated by the June 28, 1990 Order from which Petitioner appealed. Lummus also argued for summary affirmance as to the constitutionality of the Arizona product liability statute of repose because 1) Petitioner admittedly had not raised the issue below, *see* Petitioner's Revised Opening Brief, dated August 29, 1991, at 15, and 2) recent Arizona Supreme Court and Federal District Court decisions rejected identical constitutional challenges brought by Petitioner's counsel in several other cases, one of which involved Lummus and the same cotton gin involved here.

On August 1, 1991, in an unpublished Order, the Ninth Circuit granted in part and denied in part Lummus' Motion to Strike. (App. B). The Court struck Petitioner's Brief, but permitted him to submit a revised

opening brief addressing three issues referenced in footnotes 1, 2, and 3 of the District Court's June 28, 1990 Order. *Id.* These three issues are essentially issues 1, 2 and 6 from Petitioner's original Opening Brief – independent duty to warn, successor liability and the constitutionality of A.R.S. section 12-551.

The June 28, 1990 Order from which Petitioner appealed did not adjudicate the three issues stated in its footnotes, but rather merely referenced them in denying Petitioner's Motion to Certify as the issues which Petitioner sought to certify. (App. A). The issue in footnote 1 of the June 28, 1990 Order as to independent duty to warn was adjudicated by the grant of JNOV. R. 248. The issue in footnote 2 as to the constitutionality of section 12-551 was never adjudicated because Petitioner never raised it. *See* Petitioner's Revised Opening Brief, dated August 29, 1991, at 15. The issue in footnote 3 as to successor liability was addressed by the grant of partial summary judgment. R. 101, 117, 124.

On August 9, 1991, Lummus filed a Motion to Reconsider that portion of the Ninth Circuit's August 1, 1991 order permitting Petitioner to argue the three issues stated in the footnotes of the June 28, 1990 Order. The basis for the Motion was that the summary judgment, partial directed verdict and JNOV rulings which adjudicated the above three issues were not listed in, and were outside the fair scope of, Petitioner's Notice of Appeal, contrary to Rule 3(c), F.R.A.P. Petitioner also filed a Motion to Reconsider the Ninth Circuit's Order striking in part his Opening Brief. The Ninth Circuit denied both Motions in separate Orders dated August 29, 1991. (App. C and D). On August 29, 1991, Petitioner filed a Revised

Opening Brief as to issues 1, 2 and 6 stated above. On November 26, 1991 Petitioner mailed his Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

This Court should deny review for several reasons.

First, Petitioner has failed to make the showing of "imperative public importance" required by Supreme Court Rule 11 for petitions filed before the court of appeals renders judgment. The Petition should thus be denied for this reason alone.

Second, the Ninth Circuit did not hold that *Torres* overruled *Foman*, nor is there a circuit conflict as to whether Rule 3(c), F.R.A.P., is jurisdictional. This Court in *Torres* expressly addressed *Foman* and enunciated the proper rule as to whether a particular notice of appeal vests the appellate court with jurisdiction: Rule 3(c) is jurisdictional, and while a notice of appeal may be liberally construed, it must provide the "functional equivalent" of the information the Rule requires. Moreover, this Court has just recently reaffirmed the *Torres* holding in *Smith*. There is thus no need to again restate the rule governing Rules 3 and 4, nor is there any conflict in the circuits.

Third, the Ninth Circuit's holding is limited in scope because it involves the application of the principles established in *Torres*, *Foman* and *Smith v. Barry* to a specific set of facts. What the existing circuit cases show is that application of these principles to a particular notice of

appeal is fact intensive and requires the exercise of considerable judgment by the courts of appeals as to whether the information required by Rule 3 has been fairly provided. Absent plain error, which is not present here, this Court need not review the literally dozens of cases which annually apply Rule 3's standard.

Finally, the Ninth Circuit properly applied the above principles to Petitioner's Notice of Appeal and in striking portions of his Opening Brief. Indeed, if anything, the Ninth Circuit was overly lenient in permitting Petitioner to challenge on appeal rulings not within the scope of his Notice of Appeal. This Court would thus be justified in holding there is no appellate jurisdiction as to any of the arguments in Petitioner's Revised Opening Brief. The Ninth Circuit's ruling thus treated Petitioner more than fairly and is entirely consistent with *Torres*, *Foman* and *Smith*. There is thus no reason for this Court to accept review.

This Court should thus deny Rhodes' Petition for a Writ of Certiorari.

II. THE PETITION IS WITHOUT JURISDICTION BECAUSE PETITIONER FAILED TO MAKE THE SHOWING OF "IMPERATIVE PUBLIC IMPORTANCE" REQUIRED BY RULE 11.

The Petition for Writ of Certiorari lacks jurisdiction because the Court of Appeals has not rendered judgment and Petitioner has failed to make the showing of "imperative public importance" required by Supreme Court Rule 11. Pursuant to Supreme Court Rules 15.4 and 24.1(e), the Petition for Writ of Certiorari is without jurisdiction and should be denied for this reason alone.

Petitioner correctly notes that 28 U.S.C. §§ 1254(1) and 2101(e) permit a Petition for Writ of Certiorari "before judgment" by the Court of Appeals. Yet Supreme Court Rule 11 imposes an additional requirement on such extraordinary petitions:

> **CERTIORARI TO A UNITED STATES COURT OF APPEALS BEFORE JUDGMENT**
>
> A Petition for a Writ of Certiorari to review a case pending in the United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this court.

Thus, while certiorari may be sought in extraordinary cases before the Court of Appeals renders judgment, the Petitioner must make a showing of imperative public importance justifying deviation from the general rule prohibiting prejudgment petitions. As stated by this Court, a grant of certiorari before judgment by the Court of Appeals is an "extremely rare occurrence." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304, n. * (1976).

Petitioner has not, and cannot, make the showing required by Rule 11. This case does not involve a national emergency or other pressing issue requiring immediate resolution by this Court. Indeed, as recently as January 14, 1992, this Court reiterated the rules governing whether a notice of appeal satisfies Rule 3(c)'s requirements. *See Smith v. Barry*, 1992 WL 2909 (U.S. January 14, 1992). Extraordinary immediate review is thus not necessary. Indeed, Petitioner has not even *attempted* to make the requisite Rule 11 showing. Neither the jurisdictional

statement nor the argument section of his Petition sets forth any "imperative public importance."

Because Petitioner has not satisfied Supreme Court Rule 11, his Petition should be summarily denied.

III. THERE IS NO CONFLICT AS TO WHETHER THE "ORDER DESIGNATION" REQUIREMENT OF RULE 3(C) IS JURISDICTIONAL.

Petitioner attempts to create a conflict where none exists. Contrary to Petitioner's claim, *Torres*, the Advisory Committee Note to Rules 3 and 4, F.R.A.P., and this Court's recent decision in *Smith v. Barry* expressly recognize that Rule 3(c)'s requirements are jurisdictional and mandatory.

Of all pleadings in the trial and appellate courts, the notice of appeal is perhaps the simplest. Rule 3(c), F.R.A.P., requires that a notice of appeal specify only three things: 1) "the party or parties taking the appeal," 2) "the judgment, order or part thereof appealed from," and 3) "the court to which the appeal is taken."

This Court has repeatedly, and recently, held that Rule 3(c) is jurisdictional and that a notice of appeal which does not comply with the Rule does not create appellate jurisdiction as to the information not provided. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Smith v. Barry*, 1992 WL 2909 (U.S. January 14, 1992).

In *Torres* this Court, in an 8 to 1 decision, held that "failure to file a notice of appeal in accordance with the specificity requirements of Federal Rule of Appellate Procedure 3(c) presents a jurisdictional bar to the appeal." 487 U.S. at 314. In reaching this conclusion, the *Torres* Court relied on the Advisory Committee Note to Rule 3,

which provides that "because the timely filing of a Notice of Appeal is 'mandatory and jurisdictional,' . . . compliance with the provisions of [Rules 3 and 4] is of the utmost importance." The Court stated its reasoning as follows:

> The failure to name a party in a Notice of Appeal is more than excusable "informality"; it constitutes a failure of that party to appeal.
>
> . . . Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

487 U.S. 314-15.

While *Torres* involved a failure to specify the party taking the appeal, rather than the order appealed from, the Court also observed that the Advisory Committee Note "makes no distinction among the various requirements of Rule 3 and 4; rather it treats the requirements of the two rules as a single jurisdictional threshold." 487 U.S. at 315. *Torres* thus did not limit its holding to Rule 3(c)'s "party designation" requirement, but applied it to Rule 3(c) generally. 415 U.S. at 315-18. Indeed, specifying the order appealed from may be even more jurisdictionally essential than listing the parties appealing. The number of parties appealing will not, in most cases, change the issues or arguments on appeal. The order appealed from, however, defines the very scope of the appeal and what is at issue.

Torres also rejected Petitioner's argument based on *Foman v. Davis*, 371 U.S. 178 (1962) that Rule 3(c)'s party designation requirement is jurisdictional, but its order designation requirement is not. As stated by the *Torres* Court, "*Foman* did not address whether the requirement of Rule 3(c) at issue in that case was jurisdictional in nature; rather, the Court simply concluded that in light of all the circumstances, the Rule had been complied with." *Torres*, 487 U.S. at 316. *Torres* thus did not overrule *Foman*, but clarified that Rule 3(c) is jurisdictional. *Id.* To the extent there was any question after *Foman* that Rule 3(c) is a jurisdictional prerequisite, it has been eliminated by this Court's more recent decision in *Torres*.

In addition, on January 14, 1992, this Court overruled one of the cases Petitioner incorrectly claims supports his argument that Rule 3(c)'s "order designation" requirement is not jurisdictional. *See Smith v. Barry*, 1992 WL 2909 (U.S. January 14, 1992), *overruling Smith v. Galley*, 919 F.2d 893 (4th Circuit 1990), cited in Petition for Writ of Certiorari, at 9. In *Smith*, this Court reaffirmed the *Torres* holding that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." 1992 WL 2909, at 3. Smith, an inmate, filed a *pro se* premature notice of appeal. After the pending post-trial motion was adjudicated, Smith filed a brief within the deadline for filing a notice of appeal. *Id.* at 1. The Fourth Circuit dismissed Smith's appeal for lack of jurisdiction on the ground that an appellate brief cannot constitute a notice of appeal.

On January 14, 1992, this Court reversed. After noting both the order and party designation requirements of Rule 3(c), the *Smith* Court reaffirmed the *Torres* holding

that Rule 3's are jurisdictional. *Id.* at 3. The *Smith* Court thus held that an appellate brief may constitute a notice of appeal *if* it provides the information required by Rule 3(c). *Id.* at 3-5. *Smith* thus reaffirms that while the *form* of the document constituting the notice of appeal is not important, the *information* Rule 3(c) requires that it provide is a jurisdictional prerequisite.

Thus, Petitioner's claim that "not one [circuit] has held that the failure to specify the judgment appealed from is jurisdictional" is simply wrong. Petition for Writ of Certiorari, at 7. The circuits concur with *Torres* and *Smith*, as they must, that Rule 3(c)'s order designation requirement is jurisdictional. *See, e.g., Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) (Rule 3(c)'s order designation requirement is jurisdictional and prevents the Court of Appeals from considering rulings not listed in the notice of appeal); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991) (if an appellant chooses to designate specific orders in the Notice of Appeal, rather than appealing from the entire judgment, only the orders specified may be challenged on appeal); *Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 266-67 (5th Cir. 1991); *Roberts v. College of the Desert*, 870 F.2d 1411 (9th Cir. 1988); *N.A.A.C.P. v. City of Evergreen, Alabama*, 693 F.2d 1367 (11th Cir. 1982), rehearing denied, 698 F.2d 1238 (11th Cir. 1983). Even Petitioner's own cases recognize that Rule 3(c)'s order designation requirement *is* jurisdictional. *See, e.g., State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld*, 921 F.2d 409 (2nd Cir. 1990) ("combined requirements of Rules 3 and 4 of the Federal Rules of Appellate Procedure are to be treated as a single

jurisdictional threshold and may not be waived."); *Turnbull v. United States*, 929 F.2d 173 (5th Cir. 1991)("the court may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' ").

There is thus no conflict in the decisions of the circuits or this Court that failure to comply with Rule 3 is a jurisdictional bar. This Court should thus deny the Petition.

IV. THIS COURT SHOULD DENY REVIEW BECAUSE THE NINTH CIRCUIT'S ORDER STRIKING PORTIONS OF PETITIONER'S OPENING BRIEF WAS CORRECT.

Relying on *Foman v. Davis*, 371 U.S. 178 (U.S. 1962), Petitioner argues that the admitted failure of his Notice of Appeal to comply with Rule 3(c) by identifying rulings he now seeks to challenge is not jurisdictional and does not bar those issues because his intent to appeal from them can be inferred from pleadings other than his Notice and because Lummus is not prejudiced. Petitioner misapplies *Foman* and ignores the holdings of *Torres* and *Smith* discussed above.

In *Foman*, the appellant initially filed a premature notice of appeal from the judgment and subsequently filed a timely notice of appeal from the denial of his post-trial motions. The *Foman* Court recognized the appeal from the judgment because "taking the two notices" together evidenced the appellant's intent to appeal from the judgment. 371 U.S. at 181.

Foman must be read in light of this Court's more recent holdings in *Torres* and *Smith* that compliance with

Rule 3(c) is jurisdictional. First, *Torres* expressly distinguished *Foman* because *Foman* did not address whether Rule 3(c) was jurisdictional, but only whether appellant had complied with its requirements under the facts there. 487 U.S. at 317. Here, Petitioner has admitted his Notice of Appeal was deficient, and that is thus not at issue.

Second, while *Torres* recognized that "substantial compliance" with Rule 3(c) may be sufficient in some instances, the Court also held that the notice of appeal must constitute the "functional equivalent of what the rule requires." 487 U.S. at 315-16, 317. In so holding, *Torres* specifically discussed *Foman* in addressing Rule 3(c)'s requirement that the notice of appeal "designate the judgment or order . . . appealed from":

> Permitting imperfect but substantial compliance with technical requirement is not the same as waiving the requirement altogether as a jurisdictional threshold.
>
> . . .
>
> Although a court may construe the rules liberally in determining whether they have been complied with, *it may not waive the jurisdictional requirements of Rules 3 and 4, even for "good cause shown" under Rule 2, if it finds that they have not been met.*

487 U.S. at 315-16, 317 (emphasis provided).

Petitioner's Notice of Appeal here does not even come close to "substantially complying" with Rule 3(c) as to the arguments stricken from his original Opening Brief. As set forth in the Statement of the Case above, Petitioner's various theories of liability were disposed of

piecemeal by several trial court rulings – the partial summary judgment as to successor liability, the partial directed verdict as to A.R.S. section 12-551 and the JNOV as to independent duty to warn. Yet the *only* order Petitioner listed in his Notice of Appeal was the June 28, 1990 Order denying his miscellaneous motions to certify questions to the state court, to rule that Petitioner had raised the constitutionality of A.R.S. section 12-551 at trial (when he had not) and to reconsider the partial JNOV ruling in light of a recent case the court had already considered. The June 28, 1990 Order had nothing to do with issues 3, 4 and 5 stricken from Petitioner's original Opening Brief as to proximate cause, open and obvious danger and excessiveness of the verdict. If an appellant chooses to designate specific orders in his Notice of Appeal, rather than appealing from the entire judgment, only the orders specified may be challenged on appeal. *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510 (6th Cir. 1991). The Ninth Circuit thus did not err in striking issues 3, 4 and 5 from Petitioner's original Opening Brief.

Indeed, Petitioner's Opening Brief did not challenge any of the June 28, 1990 rulings, but addressed only orders not listed in his Notice of Appeal. As discussed later, the Ninth Circuit's order thus was overly lenient in permitting Petitioner's revised Brief to challenge orders clearly outside the scope of his Notice of Appeal.

The third reason *Foman* does not support Petitioner's argument is that the *Foman* Court found that the appellant substantially complied with Rule 3 because "taking the two notices" together evidenced the intent to appeal from the judgment. 371 U.S. at 181. Significantly, the *Foman* Court based its conclusion on the appellant's

express designation of the judgment in the notice of appeal itself. This is important because to require the appellate court and parties to decipher an appellant's intent from vague references in numerous pleadings other than the denominated notice of appeal is unfair, unwise, does not provide adequate notice and violates the plain language of Rules 3 and 4. As recently stated by the Fifth Circuit, "those cases that do construe notices of appeal liberally to find jurisdiction do so where it is clear, *from the face of the notice*, that the appeal intends to raise all issues or other parties." *Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 266-67 (5th Cir. 1991)(emphasis provided). Here, Petitioner argues he should be permitted to challenge numerous rulings because his intent to appeal from them is evident from various miscellaneous pleadings *other than his Notice of Appeal*. His reliance on these miscellaneous pleadings is thus inconsistent with both *Foman* and Rules 3 and 4.

Petitioner's Notice of Appeal thus did not "substantially comply" with Rule 3 or constitute the "functional equivalent" of an appeal as to the rulings challenged in his original Brief. As stated by this Court in *Torres*, "we find that petitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed." 487 U.S. at 317. As in *Torres*, Petitioner's Notice of Appeal was insufficient, and there is thus no need for this Court to accept review.

V. CERTIORARI IS NOT APPROPRIATE BECAUSE THE NINTH CIRCUIT'S ORDER WAS A FACT-SPECIFIC DETERMINATION LIMITED TO ITS FACTS.

In support of his argument, Petitioner cites numerous circuit cases finding that there was appellate jurisdiction as to the orders in question. These cases do not, as Petitioner claims, establish that Rule 3(c)'s order designation requirement is not jurisdictional. Rather, they merely apply *Torres* and *Smith*'s standard to facts distinguishable from those here. Indeed, what these cases establish is that whether a particular notice of appeal provides the information required by Rule 3(c) is a fact-specific determination. Similarly here, the Ninth Circuit justifiably held Petitioner's Notice was sufficient as to some orders and insufficient as to others after carefully reviewing the facts before it. Because numerous such cases limited to their facts arise each year, and because this Court has repeatedly and recently set forth the standards governing such cases, review by this Court is not necessary.

Petitioner's circuit cases are easily distinguishable, support the jurisdictional nature of Rule 3 (c)'s order designation requirement and the Ninth Circuit's ruling here and demonstrate the fact-intensive nature of such determinations. For example, in the Second Circuit's decision in *State Trading v. Assuranceforeningen Skuld*, 921 F.2d 409 (2nd Cir. 1990), appellant initially filed a notice of appeal from the judgment. After the first notice was withdrawn, appellant filed a second notice from the denial of its post-trial motion. The Second Circuit first noted that the "combined requirements of Rules 3 and 4 of the Federal Rules of Appellate Procedure are to be

treated as a single jurisdictional threshold and may not be waived." 921 F.2d at 412. Applying this standard, the Court permitted the appellant to challenge the judgment because the first notice listed it and because the second notice was titled a "reinstatement" of the original appeal. *Id.*

Similarly, contrary to Petitioner's claim, the Fifth Circuit has also recognized that Rule 3(c)'s "order designation" requirement is jurisdictional. *Turnbull v. United States*, 929 F.2d 173 (5th Cir. 1991) involved the Fifth Circuit's *sua sponte* review of its jurisdiction to determine if it was required to dismiss, not just limit the scope of, the appeal. The *Turnbull* Court held that the appeal from the denial of appellant's motion for new trial which challenged the entire judgment was sufficient to create jurisdiction as to the judgment because appellee conceded it was not prejudiced and had fully briefed appellant's arguments regarding the judgment. *Id.* at 178. That is clearly distinguishable from the facts here.

Moreover, *Turnbull* and the other Fifth Circuit cases cited by Petitioner must be read in light of that Court's most recent pronouncement regarding Rule 3(c):

> [T]he court "may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." . . .
>
> Thus, when an appellant "chooses to designate specific determinations in his notice of appeal – rather than simply appealing from the entire judgment – only the specified issues may be raised on appeal."

Pope v. MCI Telecommunications Corp., 937 F.2d 258, 266-67 (5th Cir. September 3, 1991).

Contrary to Petitioner's assertion, the above cases support, not contradict, the Ninth Circuit's order here. Moreover, their consistency with *Torres* and fact-specific nature shows that this Court need not, and cannot, review them all. Lummus submits that the proper role for this Court as to Rule 3(c) issues is to establish general rules to be applied to specific notices of appeal. This Court has already established such general rules in *Torres*, *Foman* and, just recently, *Smith*. While these cases, and the circuit cases, reach different results, that is because the same rules are applied to varying circumstances. The Ninth Circuit properly applied these general rules to the specific facts here, and its unpublished ruling is thus correct and limited in scope. This is thus not the type of case that requires review by this Court.

VI. IF ANYTHING, THE NINTH CIRCUIT EXCEEDED ITS JURISDICTION IN PERMITTING PETITIONER TO CHALLENGE ORDERS CLEARLY OUTSIDE THE SCOPE OF HIS NOTICE OF APPEAL.

Petitioner's final argument that Lummus would not be prejudiced by expanding the scope of the appeal here and that "equity" requires such a result is incorrect for several reasons.

First, as stated by this Court in *Torres*, "a litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived." 487 U.S. at 317, n. 3. Moreover, in the *Turnbull* case on which Petitioner relies the appellee fully

briefed the issues in question and conceded there was no prejudice. 929 F.2d at 178. Lummus, on the other hand, moved to strike Petitioner's Opening Brief when it raised numerous rulings outside the scope of Petitioner's Notice of Appeal. In any event, Lummus clearly would be prejudiced if Petitioner were permitted to challenge orders not listed in the Notice of Appeal. Petitioner's original Opening Brief challenged *only* orders *not* raised in the notice of appeal and did *not* challenge the *only* order listed in the notice of appeal. To permit Petitioner to challenge such orders clearly prejudices Lummus and, more importantly, exceeds the Court of Appeals' jurisdiction.

Petitioner's "prejudice" argument is also misplaced because it violates the timeliness requirement of Rule 4, F.R.A.P. Petitioner argues that there is appellate jurisdiction as to issues not identified in his Notice of Appeal because he did list them in his Civil Appeals Docketing Statement. Because the timely filing of a Notice of Appeal is a jurisdictional prerequisite, neither an amended notice of appeal nor any other pleading can create appellate jurisdiction after the time to appeal has expired. *See generally* Rule 4, F.R.A.P. As stated by this Court in *Torres*, "Permitting courts to exercise jurisdiction . . . after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal," which is prohibited. 487 U.S at 315.

For example, if an otherwise proper Notice of Appeal which provides the information required by Rule 3(c) is filed one day late, it lacks jurisdiction. Rules 4(a)(1), 26(b), F.R.A.P. *A fortiori*, if an untimely, but otherwise proper, notice of appeal is jurisdictionally deficient, a nonbinding "Civil Appeals Docketing Statement" cannot

possibly create appellate jurisdiction after the appeal time has run. Moreover, because an absence of jurisdiction may not be waived, an appellee's inadvertent failure to point out the inconsistency between the notice of appeal and the Civil Appeals Docketing Statement does not cure the jurisdictional defect.

Indeed, if anything, the Ninth Circuit exceeded its jurisdiction in permitting Petitioner's revised Brief to challenge orders not even remotely within the scope of his notice of appeal. Even if Petitioner's appeal from the June 28, 1990 Order were liberally construed, it clearly did not reach the partial summary judgment as to successor liability, the JNOV as to independent duty to warn and the partial directed verdict as to A.R.S. section 12-551. The only reason the Ninth Circuit permitted Petitioner to address the successor liability, independent duty to warn and A.R.S. section 12-551 constitutionality issues was that they were referenced for informational purposes in the June 28, 1990 order from which Petitioner appealed. (App. A). A notice of appeal from an order which references, as opposed to adjudicates, issues does not create jurisdiction as to them.

Because appellate courts have the responsibility to review their jurisdiction, this Court should hold that the Ninth Circuit lacks jurisdiction to review any of the issues addressed in Petitioner's Brief. This Court should thus both deny the Petition for a Writ of Certiorari and instruct the Ninth Circuit that its jurisdiction extends only to the matters adjudicated by the June 28, 1990 Order from which Petitioner appeals. As stated by the *Torres* Court:

> We recognize that construing Rule 3(c) as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is "imposed by the legislature and not by the judicial process."

487 U.S. at 318.

CONCLUSION

For Rule 3(c) to have any meaning, there must be a point at which a notice of appeal's failure to list orders means that those rulings may not be challenged on appeal. This is such a case. Even construing Petitioner's Notice liberally, the facts here justified the Ninth Circuit's order striking some of the issues addressed in Petitioner's Brief. Indeed, this Court should instruct the Ninth Circuit that the arguments in Petitioner's Revised Brief also exceed the scope of appellate jurisdiction.

In addition, there is no conflict in the decisions of this Court or the circuits requiring review by this Court. The Ninth Circuit here properly applied the principles set forth in *Torres*, *Foman* and *Smith* to the facts of this case. Moreover, its unpublished order is limited to its facts. Finally, the Petition should be summarily denied because it fails to comply with Supreme Court Rule 11.

This Court should thus deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A-1

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CHRISTOPHER L. RHODES, a single man, Plaintiff, - vs. CONTINENTAL CONVEYOR & EQUIPMENT COMPANY, INC., a Delaware corporation, LUMMUS INDUSTRIES, INC., a Georgia corporation, Defendants.	Case No. CIV 86-616 TUC RMB [JMF] ORDER (Filed Jun. 28, 1990)

Plaintiff's Motion For Relief Of Judgment; Or, In The Alternative Motion For Reconsideration is DENIED. The certified question answered by the Arizona Supreme Court in *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939 (Ariz. 1990), and the Ninth Circuit's conforming decision, *Torres v. Goodyear Tire & Rubber Co.*, No. 87-2062, slip op. (9th Cir. Apr. 13 1990), were both available to and considered by me before I entered my order of May 2, 1990. Nothing in those decisions mandates legal conclusions different from those I have made regarding the duty to warn based on theories of negligence.

APPENDIX A-2

As to points two[1] and three[2], plaintiffs Petition For Certification Order is DENIED. As for point one[3],

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[1] Point two being:

> Whether a corporation (Lummus Industries, Inc.) that acquires significant property interests of a prior corporation (including critical patents) and then manufactures an essentially identical product (high-capacity roller gin) and continues to maintain and service the predecessors' cotton gins has an independent duty to warn of the prior corporation's defective product?

Plaintiff's proposed certification order at 2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

[2] Point three being:

> Whether the twelve year Statute of Repose limitations portion of A.R.S. § 12-551 is unconstitutional under Article 18, Section 6 under the due process/equal protection divisions of the Arizona Constitution when the machine involved in the injury was distributed for use more than twelve years prior to the injury.

Plaintiff's proposed certification order at 2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

[3] Point one being:

> Whether a corporation (Lummus Industries, Inc.) that acquires significant property interests of a prior corporation (including critical patents) and then manufactures an essentially identical product (high-capacity roller gin) and continues to maintain and service the predecessors' cotton gins may be liable as a successor corporation under strict liability and/or negligence for a defective and unreasonably dangerous product?

Plaintiff's proposed certification order at 1-2, attached to Plaintiff's Petition For Certification Order, filed June 1, 1990.

plaintiff should make his application to Chief Judge Bilby since Judge Bilby made the substantive ruling on the issue of successor liability.

Plaintiff's Renewed Application For Clarification Of The Court's Ruling On The Constitutionality Of A.R.S. § 12-551 is DENIED.

Good cause showing, plaintiff's Motion To Extend Time For Filing Notice Of Appeal is GRANTED. Plaintiff shall have until July 20, 1990, to file his notice of appeal.

IT IS SO ORDERED.

DATED this 20th day of June, 1990, at Anchorage, Alaska.

/s/ James M. Fitzgerald
JAMES M. FITZGERALD
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES, Plaintiff-Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant-Appellee.	No. 90-16033 DC# CV-86-0616-RMB Arizona (Tucson) ORDER (Filed Aug. 1, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellee's motion to strike appellant's opening brief is granted. *See* Fed. R. App. P. 3(c). Appellee's alternative motion for summary affirmance is denied.

Within 28 days of the date of this order, appellant shall file a new opening brief. Appellant's brief shall be limited to the issues defined in footnotes 1, 2, and 3 of the district court's June 28, 1990 order. The remainder of the briefing schedule shall be as set forth in Fed. R. App. P. 31(a). Failure to comply with this order may result in dismissal of this appeal pursuant to 9th Cir. R. 42-1.

MoCal 7/30/91.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES, Plaintiff-Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant-Appellee.	No. 90-16033 DC# CV-86-0616-RMB Arizona (Tucson) ORDER (Filed Aug. 29, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellant's motion to reconsider is denied. No further motions to reconsider will be entertained.

MoCal 7/30/91 (Mem 8/91)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER L. RHODES, Plaintiff-Appellant, vs. CONTINENTAL CONVEYORS, Defendant, vs. LUMMUS INDUSTRIES, INC., Defendant-Appellee.	No. 90-16033 DC# CV-86-0616-RMB Arizona (Tucson) ORDER (Filed Aug. 29, 1991)

Before: WALLACE, Chief Judge and FARRIS, Circuit Judge

Appellee's motion to reconsider or clarify is denied. Appellee is reminded that the panel that considers this appeal on the merits has the discretion to decide whether certain orders or issues are properly before it. The briefing schedule established in the court's August 1, 1991 order shall remain in effect.

MoCal 7/30/91 (Mem 8/91)